In the Supreme Court
OF THE
United States

OCTOBER TERM, 1940

No. 307

ROYAL INSURANCE COMPANY, LTD.
(a corporation),
Petitioner,

vs.

ROBERT A. SMITH,
Respondent.

PETITIONER'S REPLY BRIEF.

PERCY V. LONG,
Merchants Exchange Building, San Francisco, California,
Attorney for Petitioner.

LONG & LEVIT,
BERT W. LEVIT,
WILLIAM H. LEVIT,
Merchants Exchange Building, San Francisco, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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I.

Respondent objects that the showing of petitioner is inadequate to justify certiorari.

A. He says (p. 2) that the points urged by us do not "fall within the letter or spirit" of Rule 38, because "the issues revolve entirely upon local or state laws".

This is not true as to the procedural question involved in the Circuit Court's *reversal* to permit re-

spondent to amend to conform to proof, which action constitutes, we submit, so wide a departure from the usual course of judicial procedure as to call for an exercise of the supervisory power of this Honorable Court. (See, our Petition and supporting Brief, Point I.)

It is true that the proper construction of the contract in suit is a question, ultimately, of "state law". *Erie R. Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487. But the petition and brief point out (Point II) that the decision of the Circuit Court in this connection is "probably untenable" and therefore probably in conflict with the state law as yet unannounced by any Court of the State of California.[1] And this has been recognized as an appropriate basis for certiorari. *Ruhlin v. N. Y. Life Ins. Co.,* 304 U. S. 202, 206, 58 S. Ct. 860, 82 L. Ed. 1290, 1292.[2] Moreover, our petition (p. 11) and brief (pp. 14-15) further show that the construction adopted by the Circuit Court resulted from a failure to follow applicable rules of California law laid down both by statute and by decision of the highest Court of this State.

B. Respondent intimates (p. 2) that petitioner has asked this Court to review the evidence in order to determine whether it establishes the existence of a leasehold interest in respondent.

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1. The Petition (p. 12, par. 1) asserts that "the subject is one of first impression". This is borne out by respondent's brief; the authorities cited by him (p. 9) are on other points entirely, as will be noted hereinafter. (See, infra, p. 4.)

2. This case, strangely, is the only authority cited by respondent in support of his contention that certiorari is not justified on petitioner's showing.

This is wholly incorrect. The Circuit Court decided that the evidence established that respondent was a month-to-month tenant. Neither petitioner nor respondent questions this finding.

The learned Circuit Court *then* concluded (erroneously, as petitioner contends) that a month-to-month tenancy is a "lease" and a "leasehold interest" within the meaning of those words in the policy in suit. The correctness of this conclusion is strictly a question of law, since it has not been contended that the interpreted words are ambiguous within or without their context.

C. Respondent argues (pp. 2-3) that petitioner's grievance is "in the main anticipatory", because there is as yet "no final judgment". However, respondent himself successfully nullifies this contention by asserting (p. 8) that the Circuit Court intended the case to be remanded to allow *"not a new trial"*[3] but merely a presentation of petitioner's "affirmative defenses, if any".

This, of course, strengthens the showing made for certiorari, since,

> "For all practical purposes the decision of the Circuit Court of Appeals is a final judgment; it settles all questions of law involved in respondent's right of recovery under the policy, leaving only subordinate questions of fact for decision." (Petition, p. 12.)

3. Italics are respondent's.

II.

Respondent attempts (p. 8) to brush aside the claimed error of interpretation of the terms "lease" and "leasehold" as of no moment.

No refutation is attempted of petitioner's argument that the Circuit Court's interpretation *was* in error (Petition and Brief, Point II), other than the bald citation of three cases which, according to respondent (p. 9), show that a month-to-month tenancy "under the laws of the State of California is a leasehold interest".

The cases cited by respondent are inapposite.

(a) *Davis v. Phoenix Ins. Co.*, 111 Cal. 409, 414, 43 Pac. 1115. This case involved neither a month-to-month tenancy nor a lease or leasehold. The property insured was a dwelling house, which was being purchased by the assured on contract. The policy required that the assured be the sole and unconditional owner of the property; but it also referred to a written application wherein the full nature of assured's interest and title was accurately stated. The Court most properly held that the reference in the policy to the application precluded reliance by the insurer upon any policy requirements contrary to the facts stated in the application.

(b) *Brown v. Sweet*, 95 Cal. App. 117, 123-4, 272 Pac. 614. This was a suit to recover money paid by plaintiff to defendant on a contract for the purchase of real property, which the latter failed to convey to the former. No questions of insurance or insurable interest were raised or discussed.

(c) *Schaeffer v. Anchor Mut. Fire Ins. Co.,* 133 Iowa 205, 207, 85 N. W. 985. This case holds that even a tenant at will has an insurable interest *in the building* he occupies. This proposition is self-evident. Any legally valid interest, however slight, is an insurable interest if the loss of that interest by the peril insured against would damnify the assured. But, in the case at bar, the policy did not cover on a *building;* it covered on a tenure of a particular kind, namely, on a leasehold interest. The existence of an insurable interest in a *building* does not imply the existence of an insurable interest in a specified *tenure* of the land upon which the building stands. To have an insurable interest in a *building,* one must have some interest *in the building;* to have an insurable interest in a *leasehold tenure,* one must have some interest *in a leasehold tenure.* Certainly, the *Schaeffer* case does not touch upon the question of whether a month-to-month tenancy is or is not a leasehold interest.

III.

Respondent makes no effort to refute petitioner's contention (Point I of Petition and Brief) that the decision below completely departed from the established procedural rule that amendments to conform to proof are permitted on appeal only to sustain a judgment, and not to reverse a judgment otherwise proper; that by so doing, the Circuit Court created error instead of correcting it; and that this unusual procedure calls for an exercise of the Supreme Court's power of supervision.

Respondent, surprisingly, attempts to justify the decision of reversal by criticising the Circuit Court's first opinion herein. He says (p. 3) that it is "the first and eminently appropriate function of any Court to correct *its own error*"; he speaks (p. 4) of "*the frailty or oddity of the first opinion*"; and he refers (pp. 4-5) to the latest opinion of the Circuit Court as a "*corrective* opinion" in which that Court "with commendable frankness was, at least in part, correcting *its own error*".

It is submitted that these "arguments" furnish a particularly strong and added reason why certiorari should be granted as prayed. Both petitioner and respondent admit, nay, contend! that the Circuit Court has erred in the decisions rendered in this case. What more persuasive situation could arise to justify the granting of the writ than this?

Dated, San Francisco, California,
September 12, 1940.

Respectfully submitted,
PERCY V. LONG,
Attorney for Petitioner.

LONG & LEVIT,
BERT W. LEVIT,
WILLIAM H. LEVIT,
Of Counsel.